3

BY FAX

DURIE TANGRI LLP
SONAL N. MEHTA (SBN 222086)
smehta@durietangri.com
JOSHUA H. LERNER (SBN 220755)
jlerner@durietangri.com
LAURA E. MILLER (SBN 271713)
lmiller@durietangri.com
CATHERINE Y. KIM (SBN 308442)
ckim@durietangri.com
ZACHARY G. F. ABRAHAMSON (SBN 310951)
zabrahamson@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendant
Facebook, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation; MARK ZUCKERBERG, an individual; CHRISTOPHER COX, an individual; JAVIER OLIVAN, an individual; SAMUEL LESSIN, an individual; MICHAEL VERNAL, an individual; ILYA SUKHAR, an individual; and DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond Swope, Dept. 23

DECLARATION OF CATHERINE Y. KIM IN SUPPORT OF DEFENDANT FACEBOOK, INC.'S EX PARTE APPLICATION FOR AN ORDER COMPELLING THOMAS SCARAMELLINO'S ADDRESS

Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

I, Catherine Y. Kim, hereby declares as follow:

1. I am an attorney at law licensed to practice in the State of California. I am counsel of record in this matter for Defendant Facebook, Inc. ("Facebook"). I make this Declaration from personal knowledge, and if called to testify, I could and would testify competently thereto.

2. Attached hereto as **Exhibit 1** is a true and correct copy of an email thread between me and Jack Russo, beginning on March 18, 2019, and ending March 20, 2019.

3. Attached hereto as **Exhibit 2** is a true and correct copy of letter from Jack Russo to me, dated March 20, 2019.

4. Facebook tried serving a subpoena at the address that Mr. Scaramellino provided when he was deposed in April 2017, but was unsuccessful.

5. On April 21, 2017, Mr. Scaramellino testified under oath that his address was in [redacted]

6. Attached hereto as **Exhibit 3** is a true and correct copy of a letter from Christopher Sargent to Laura E. Miller, dated December 10, 2018.

7. Attached hereto as **Exhibit 4** is a true and correct copy of the Declaration of Thomas Scaramellino, filed in this matter on February 6, 2019.

8. Attached hereto as **Exhibit 5** is a true and correct copy of the Declaration of Thomas Scaramellino in Support of Opposition to Defendant Facebook, Inc.'s Second Improper Motion for Reconsideration to Open Discovery, filed in this matter on February 28, 2019.

9. Attached hereto as **Exhibit 6** is a true and correct copy of excerpts of the Declaration of Thomas Scaramellino in Compliance with Amended Case Management Order No. 19, filed in this matter on March 14, 2019.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 21st day of March, 2019.

CATHERINE Y. KIM

PROOF OF SERVICE

I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On March 21, 2019, I served the following documents in the manner described below:

DECLARATION OF CATHERINE Y. KIM IN SUPPORT OF DEFENDANT FACEBOOK, INC.'S EX PARTE APPLICATION FOR AN ORDER COMPELLING THOMAS SCARAMELLINO'S ADDRESS

[X] BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from cortega@durietangri.com to the email addresses set forth below.

On the following part(ies) in this action:

Stuart G. Gross
GROSS & KLEIN LLP
The Embarcadero, Pier 9, Suite 100
San Francisco, CA 94111
sgross@grosskleinlaw.com

David S. Godkin
James Kruzer
BIRNBAUM & GODKIN, LLP
280 Summer Street
Boston, MA 02210
godkin@birnbaumgodkin.com
kruzer@birnbaumgodkin.com

Attorneys for Plaintiff Six4Three, LLC

Donald P. Sullivan
Wilson Elser
525 Market Street, 17th Floor
San Francisco, CA 94105
donald.sullivan@wilsonelser.com
Joyce.Vialpando@wilsonelser.com
Dea.Palumbo@wilsonelser.com

Attorney for Gross & Klein LLP

Jack Russo
Christopher Sargent
ComputerLaw Group, LLP
401 Florence Street
Palo Alto, CA 94301
jrusso@computerlaw.com
csargent@computerlaw.com
ecf@computerlaw.com

Attorney for Theodore Kramer and Thomas Scaramellino (individual capacities)

Steven J. Bolotin
Morrison Mahoney LLP
250 Summer Street
Boston, MA 02210
sbolotin@morrisonmahoney.com
Llombard@morrisonmahoney.com

James A. Murphy
James A. Lassart
Thomas P Mazzucco
Joseph Leveroni
Murphy Pearson Bradley & Feeney
88 Kearny St, 10th Floor
San Francisco, CA 94108
JMurphy@MPBF.com
jlassart@mpbf.com
TMazzucco@MPBF.com
JLeveroni@MPBF.com

Attorney for Birnbaum & Godkin, LLP

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 21, 2019, at San Francisco, California.

Christina Ortega

EXHIBIT 1

From: Catherine Kim
To: Jack Russo; Chris Sargent
Cc: SERVICE-SIX4THREE
Subject: RE: 643 v. Facebook
Date: Wednesday, March 20, 2019 6:56:11 PM

Dear Mr. Russo - I write to follow up on Monday and Tuesday's emails. You still have not confirmed whether you can accept service or provided current address information. We are disappointed by your failure to cooperate in the discovery process and will raise this matter with the Court if necessary.

Sincerely, Cat Kim

From: Catherine Kim
Sent: Tuesday, March 19, 2019 2:17 PM
To: 'Jack Russo' <jrusso@computerlaw.com>; 'Chris Sargent' <csargent@computerlaw.com>
Cc: SERVICE-SIX4THREE <SERVICE-SIX4THREE@durietangri.com>
Subject: RE: 643 v. Facebook

Dear Mr. Russo – I write to follow up on yesterday's email. Please provide the information requested below.

Sincerely, Cat Kim

From: Catherine Kim
Sent: Monday, March 18, 2019 1:02 PM
To: Jack Russo <jrusso@computerlaw.com>; Chris Sargent <csargent@computerlaw.com>
Cc: SERVICE-SIX4THREE <SERVICE-SIX4THREE@durietangri.com>
Subject: 643 v. Facebook

Dear Mr. Russo,

Please confirm whether you will accept service of subpoenas to Mr. Kramer and Mr. Scaramellino on their behalf. Additionally, please provide Mr. Kramer and Mr. Scaramellino's current addresses for the subpoenas.

Cat Kim | Durie Tangri LLP | ckim@durietangri.com | 415-376-6434

EXHIBIT 2

COMPUTERLAW GROUP LLP
ATTORNEYS AT LAW
401 FLORENCE STREET
PALO ALTO, CALIFORNIA 94301
COMPUTERLAW.COM

TELEPHONE
(650) 327-9800

FAX
(650) 618-1863

March 20, 2019

Via Email

Catherine Kim, Esq.
Durie Tangri LLP
217 Leidesdorff Street
San Francisco, CA 94111
ckim@durietangri.com

Re: Six4Three, LLC v. Facebook, Inc. et al.
San Mateo Super. Ct. Case No. CIV 533328

Dear Ms. Kim:

We are in receipt of your request for confirmation regarding the addresses of our clients. Given the lack of mutuality in the approach you have taken so far, our clients have requested that before you ask us for any further mutual cooperation, you answer with *specifics* the five questions we posed to you over two months ago (see attached) and which remain unanswered. Once again, they are:

1. "What are the obligations of the Court where a House of Commons committee orders the release of documents in contravention to the Court's orders?"
2. "What are the procedures for Mr. Kramer, who was visiting the United Kingdom on business, to respond or object to the DCMS letter demand?"
3. Defendant has offices in London. Is Defendant subject to the jurisdiction of DCMS?"
4. "Has DCMS or other committee [*sic*] served a similar demand for unredacted copies of sealed documents on Defendant? If so, how has Defendant responded?" Nov. 20 Order ¶ 3-5.
5. And, of course, how is it that Section 16 of the Stipulated Protective Order does not afford a complete defense here given the notices that were indisputably given to Facebook and its legal counsel?

Despite your previous deflection that these items have been the "subject of extensive briefing before the Court," it was not until March 15 that Facebook first made the statement that it contacted DCMS prior to the November seizure of documents in London. It should be a simple matter to substantiate this claim in detail. Indeed, at the March 15 Hearing, Facebook persistently maintained to the Court that only "one side of the story" has been heard, and yet Facebook has continuously shrouded its own side of the story behind refusals to answer the above. Facebook cannot hope to prevail on any contempt without addressing these questions, and certainly cannot hope for cooperation without providing cooperation in kind. Santa Clara County Bar Assn. Rules of Professionalism § 3.

Please advise.

Very truly yours,

Jack Russo

cc: Counsel of Record via Email
Enclosure

COMPUTERLAW GROUP LLP
ATTORNEYS AT LAW
401 FLORENCE STREET
PALO ALTO, CALIFORNIA 94301
COMPUTERLAW.COM

TELEPHONE
(650) 327-9800

FAX
(650) 618-1863

January 15, 2019

Via Email

Sonal N. Mehta, Esq.
217 Leidesdorff Street
San Francisco, CA 94111
smehta@durietangri.com

Re: Six4Three, LLC v. Facebook, Inc. et al.
San Mateo Super. Ct. Case No. CIV533328

Dear Counsel:

You have asked for an "immediate response" to a letter that contains numerous factual assertions and assumptions that we simply cannot accept understanding the remedies that you are after with respect to two individuals who are not actual parties in this litigation and to the best of our knowledge have not been added as parties in any other aspect of this litigation. If we are wrong about the latter, can you advise us immediately on this and we will review your position promptly.

In the meantime, we remind you of the rulings made by the Court that no depositions or discovery were to occur in this case and that the procedures employed by Facebook to date were (and are) procedurally improper. See attached Transcript of Hearing dated December 17, 2018 at pages 4-7.

We also remind you of the list of procedural questions that the Court posed to Facebook and that to date have not been answered, including:

1. "What are the obligations of the Court where a House of Commons committee orders the release of documents in contravention to the Court's orders?"
2. "What are the procedures for Mr. Kramer, who was visiting the United Kingdom on business, to respond or object to the DCMS letter demand?"
3. "Defendant has offices in London. Is Defendant subject to the jurisdiction of DCMS?"
4. "Has DCMS or other committee [*sic*] served a similar demand for unredacted copies of sealed documents on Defendant? If so, how has Defendant responded?"
   Nov. 20 Order ¶ 3-5.
5. And, of course, how is it that Section 16 of the Stipulated Protective Order does not afford a complete defense here given the notices that were indisputably given to Facebook and its legal counsel?

If your letter is effectively some type of "informal" notice of a contempt claim (criminal, civil, or otherwise) that you are asserting against either of our individual clients, would you please confirm that in writing and set forth in detail the petition that you have filed seeking a finding of such contempt and the specific relief that you are seeking against our clients. See Koehler v. Superior Court, 181 Cal.App.4th 1153 at 1169-1171, (2010). Failing these minimum procedural steps, we do not believe that you can reasonably request any discovery activities occur in this case without the appropriate filings and without providing answers to the above questions. Any motion by you that seeks to reverse or even modify the Court's existing no discovery orders should meet the requirements for reconsideration motions. See CCP Section 1008.

Please advise.

Very truly yours,

Jack Russo

cc: Counsel of Record via Email

Enclosure

EXHIBIT 1

MS. MEHTA: Good morning, Your Honor. Sonal Mehta, Josh Lerner, Laura Miller, Catherine Kim, and Zachary Abrahamson from Durie Tangri for Facebook. And also here are Paul Grewawal, vice-president, deputy general counsel for litigation from Facebook, and Natalie Nagle, associate general counsel for litigation at Facebook.

THE COURT: Good morning. I am going to have to make a disclosure. I don't think it's really that necessary, but I am going to do it, nevertheless.

I used to work for Mr. Sullivan's firm nearly 30 years ago at Wilson, Elser, Moskowitz, Edelman & Dicker in San Francisco. I also used to work with Mr. Lassart at Ropers, Majeski, Kohn & Bentley over 20 years ago. Any connections or affiliations are long past, and I hope that the parties will appreciate the disclosure.

And if there's no objection, we'll go forward.

All right. I just mentioned that in an abundance of caution.

This court has taken considerable time without the pressure of a briefing schedule and has looked at this over the weekend. And the court has reflected on the matters that have occurred in the recent weeks with regard to the violation of the court order and the subsequent release by the House of Commons and so forth.

And the court has, therefore, reconsidered certain orders it has previously issued with regard to the matters that are pressing. Therefore, in particular, the order reopening discovery for the limited purpose of investigating the breach of the court orders is vacated.

The reason for this is that I agree with Mr. Russo and, essentially, the inferences raised by Facebook, that there may be sufficient information to serve as a basis for a motion for terminating sanctions and for an application for order to show cause re: Contempt that's been issued by the parties.

Accordingly, the court is ordering the following: The forensic examiner should preserve and maintain the custody of the data collected pursuant to the court order.

The court orders preservation of that data, and nothing shall be disclosed to any of the parties until further order of the Court.

The forensic examiner shall not run any search terms at all, unless necessary for the preservation of the data, and such preservation, or necessity, shall only be pursuant to a court order.

Second, the court will not appoint a third-party discovery referee, nor will the court appoint a discovery referee for depositions.

The court further orders that there shall be

no depositions of lawyers in this case until further order of the Court, and there shall be no depositions of Mr. Kramer or Mr. Scaramellino until further court order.

This court believes that it is improper to compel attorneys to be subjected to deposition in view of the attorney-client privilege and the attorney work product doctrine protections.

In the absence of any further briefing on the motions and without the establishment of the two-step showing that is necessary under Evidence Code Section 956, that two-step showing, the prima facie case and the reasonable relationship between the communication and the crime of fraud has not been established, and we're not there.

The deposition of Mr. Scaramellino shall not go forward because he's in a bit of a gray area. Number one, he is a member of the legal team, and, presumably, everything that he would do would be imputed to the law firms that he works for; and, second, he's also an investor in Six4Three. So the deposition of Mr. Kramer shall not go forward, either, as I had said at the outset with the suspension of the discovery order having been made.

Now, Facebook has previously sought an expedited briefing on terminating sanctions and

contempt, which skips a number of procedural steps. This is improper. Therefore, if it chooses to do so, Facebook, may file its noticed motion for terminating sanctions pursuant to Code of Civil Procedure Section 2023.030, with the ordinary briefing schedule pursuant to Code of Civil Procedure Section 1005(b).

Further, if it elects to do so, Facebook may make an application for an order to show cause re: Contempt with a properly prepared application and affidavit pursuant to Code of Civil Procedure Sections 1211 and 1211.5, pursuant to Code of Civil Procedure Section 1005(b) upon personal service as is required for any contempt citations, if Facebook elects to do so.

With regard to the certification of destruction, Facebook needs to serve the notice of entry of order regarding the return and/or destruction of confidential documents in order for that 48-hour period to begin.

MS. MEHTA: That was done on Friday, Your Honor.

THE COURT: Very well.

The motions for attorneys' fees shall go forward on January 11th, 2019, at nine o'clock a.m.

Facebook shall prepare the order based upon what I've just announced on the record.

EXHIBIT 2

181 Cal.App.4th 1153
Court of Appeal, First District, Division 2, California.

In re Henry James KOEHLER, on Habeas Corpus.

No. A125012.
|
Feb. 5, 2010.

Synopsis

Background: The Superior Court, San Mateo County, No. 071764, Susan I. Etezadi, J., initiated contempt proceeding against attorney with order to show cause, found attorney in contempt, and sentenced him to five days in jail. Attorney filed petition for writ of habeas corpus. The Court of Appeal issued order to show cause, and the Superior Court filed a return.

Holdings: The Court of Appeal, Richman, J., held that:

it was improper to initiate contempt proceeding without initiating affidavit;

personal service of contempt citation was required;

order and judgment of indirect contempt improperly omitted findings and evidence;

it was improper to impose multiple punitive contempt judgments for attorney's failure to pay discovery sanction; and

attorney's ability to pay was an element of the contempt, rather than an affirmative defense.

Reversed.

Attorneys and Law Firms

****879** Henry James Koehler, in pro. per.; Barry M. Karl by appointment by the Court of Appeal, for Petitioner.

Meyers, Nave, Riback, Silver & Wilson, Joseph M. Quinn for Respondent.

Perkins Coie LLP, Kirk A. Dublin for Real Parties in Interest.

Opinion

RICHMAN, J.

***1156** Petitioner Henry James Koehler became the attorney for wife in the midst of an acrimonious and bitterly contested divorce proceeding. Confidential documents that were the property of some third parties had been provided to wife, and she and petitioner refused to return them, even after a court order to do so. Third parties obtained an order awarding $10,000 in discovery sanctions, which were not paid, and third parties initiated proceedings for indirect contempt. Petitioner resisted, represented by a court-appointed attorney, but without success, and was held in contempt and ordered to serve five days in jail, which he did. But he did not pay the $10,000.

****880** Seven months later, apparently acting on its own and with no initiating affidavit, the superior court issued an order to show cause regarding contempt. Petitioner, again represented by court-appointed counsel, asserted jurisdictional, procedural, and substantive arguments in opposition. The superior court rejected the arguments, and ordered petitioner to serve another five days in jail, which he did. Less than two months later, again acting on its own and with no initiating affidavit, the superior court issued yet another order to show cause. Following a brief hearing at which petitioner appeared in propria persona, the court again held petitioner in contempt and ordered him to serve another five days in jail. This writ proceeding followed.

***1157** The leading expert on California judicial conduct has observed that "[t]he procedures for punishing direct, hybrid, and indirect contempt are different. Significant additional due process rights are involved in an indirect contempt that do not come into play in direct and hybrid contempt. For this reason, it is mandatory that judges be familiar with the procedures governing direct contempt. To invoke the power of contempt without knowing or learning the law is misconduct [citation]." (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 4.01, p. 154.) What happened here did not measure up to that law, not by a long shot. Treating the petition as one for prohibition, we grant it, and thus annul the contempt order, bringing an end to a most unfortunate chapter in this family law saga.

BACKGROUND

Husband and wife were embroiled in a vigorously contested divorce case in the San Mateo County Superior Court, which began in August 2002. (See *In re Marriage of Papazian* (Apr. 22, 2009, A114961/A116750/A117270) [nonpub. opn.] 2009 WL 1076879.) Petitioner became wife's attorney in July 2005. According to petitioner, he became wife's attorney late in the proceedings, after wife's prior attorney "caved in" to husband's "fraud" in covering up his assets, and petitioner attempted to set aside various earlier-entered orders. Once petitioner entered the fray, numerous charges and countercharges flew between the sides, which included scathing correspondence between petitioner and husband (who at times was representing himself). The details of all that occurred are not before us, but suffice to say that what we know was particularly unpleasant.

During the course of discovery, documents containing certain confidential information belonging to Lucky Strike Farms, Inc., Papazian Properties Company, and Gilbert and Margaret Papazian (collectively, third parties)[1] had been provided to wife. On April 25, 2006, third parties filed for a protective order requiring, inter alia, the return of these documents; and on August 8, 2006, they obtained an order to that effect, ordering return of the documents by no later than August 18. The documents were not returned.

On October 17, 2006, third parties moved for an award of discovery sanctions under Code of Civil Procedure sections 2017.020, subdivision (b), and 2023.030, subdivision (a), and for mandatory injunctive relief. They also sought an award of $17,270 from wife and petitioner, allegedly the attorney fees incurred in pursuing the protective order and in attempting to obtain the return of the documents.

****881** ***1158** A hearing on this motion was held on November 27, 2006, before the Honorable Clifford Cretan. After considering the arguments presented by both sides, Judge Cretan ordered both petitioner and wife to pay third parties sanctions in the amount of $10,000. With petitioner acting as her attorney, wife filed an appeal from that order. Petitioner did not file an appeal on his own behalf. On April 22, 2009, we affirmed both that order and other orders entered by the trial court. (*In re Marriage of Papazian, supra,* (A114961/A116750/A117270).)

Petitioner never paid the $10,000 sanctions, and on May 30, 2007, third parties initiated contempt proceedings against him. Before turning to a discussion of what thereafter ensued, we set forth some fundamental principles regarding contempt, particularly indirect contempt.

Some Fundamental Principles

We quoted above from Judge David Rothman, a recognized expert in the field of judicial conduct. Early in his lengthy chapter on contempt—a chapter replete with warnings and reminders about the necessity of judges' being especially vigilant in conducting contempt proceedings—Judge Rothman advises judges about "useful resources," including this: "For a useful and up-to-date reference on contempt and sanctions, see the Courtroom Control: Contempt and Sanctions, California Judges Benchguide (Revised 2006), produced by the Center for Judicial Education and Research of the Administrative Office of the Courts [(Benchguide)]...." (Rothman, *supra,* § 4.04, p. 157.)

The Benchguide is hardly the only readily available judicial resource regarding exercise of the contempt power. Another is the California Judges Benchbook: Civil Proceedings Before Trial (2d ed. 2008) (Benchbook), which "focuses on the judge's role," and provides "practical working tools to enable a judge to conduct proceedings fairly, correctly, and efficiently. [It is] written from the judge's point of view, giving the judge concrete advice on what to look for and how to respond." (Benchbook, Preface, p. v.) Chapter 17 of the Benchbook deals with sanctions and contempt.

Both the Benchguide and the Benchbook set forth in detail both the substantive law of contempt and the procedures to be followed; they also provide much practical advice. Illustrative is this from the Benchguide: "Civil contempt proceedings under CCP §§ 1209–1222, whether punitive or coercive, may arise out of either civil or criminal litigation. Furthermore, even though they are denominated civil, these proceedings are criminal in nature because of the penalties that a judge may impose. ***1159** *People v. Gonzalez* (1996) 12 Cal.4th 804, 816 [50 Cal.Rptr.2d 74,

910 P.2d 1366]. The constitutional rights of the accused must be observed. See *Hicks v. Feiock* (1988) 485 U.S. 624, 632 [108 S.Ct. 1423, 99 L.Ed.2d 721] (guilt in *criminal* contempt proceeding must be proved beyond reasonable doubt); *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1256 [265 Cal.Rptr. 144, 783 P.2d 731] (when there are punitive sanctions, guilt must be established beyond reasonable doubt). [Citations.]" (Benchguide, *supra*, § 3.25, p. 3–29.) The Benchbook is similar. (Benchbook, *supra*, § 17.77, pp. 439–440.)

Both books discuss the three types of contempt, direct, hybrid, and indirect, the last of which was invoked here against petitioner. "The facts supporting *indirect* contempt arise outside the judge's presence, requiring a more elaborate procedure to notify the person charged and to afford an opportunity to be heard. See CCP §§ 1211–1217; ****882** *Arthur v. Superior Court* (1965) 62 Cal.2d 404, 408 [42 Cal.Rptr. 441, 398 P.2d 777]. A common example is a party's disobedience of a judge's order." (Benchbook, *supra*, § 17.78, p. 440.)

Both books also provide informative discussions of the difference between punitive and coercive forms of punishment. The Benchguide makes clear, for example, that "[i]n punitive proceedings, commonly referred to as 'civil-punitive,' the court may impose a fine not to exceed $1000 and/or a term of imprisonment not to exceed five days to punish a party for each separate act of contempt. See CCP § 1218(a); *Fine v. Superior Court* (2002) 97 Cal.App.4th 651, 674 [119 Cal.Rptr.2d 376] (five-day sentence was appropriate punishment for attorney adjudged in contempt for filing false statement of disqualification under CCP § 170.1). See also CCP § 1218(b)–(c) (punishment for failure to comply with family court order). On what constitutes a separate act of contempt, see *Donovan v. Superior Court* (1952) 39 Cal.2d 848, 855 [250 P.2d 246] (four distinguishable violations of injunction warranted multiple fines); *Conn v. Superior Court* (1987) 196 Cal.App.3d 774, 786 [242 Cal.Rptr. 148] (contemner's repeated failures to turn over documents as ordered constituted single act of contempt). The test is whether there were separate insults to the court's authority, several of which may occur on the same day. *Reliable Enterprises, Inc. v. Superior Court* (1984) 158 Cal.App.3d 604, 621 [204 Cal.Rptr. 786] ... (multiple fines for separate violations of injunction occurring on different days.)" (Benchguide, *supra*, § 3.28, p. 3–30.)

"In coercive proceedings, the court uses imprisonment to compel performance of some act or duty required of a person that the person has the ability, but refuses, to perform, *e.g.,* to answer a question as a witness. CCP § 1219(a).... The court must specify the act to be performed in the warrant of commitment. See CCP § 1219(a); *Morelli v. Superior Court* (1969) 1 Cal.3d [328,] 332 [82 Cal.Rptr. 375, 461 P.2d 655]; *H.J. Heinz Co. v. Superior* ***1160** *Court* (1954) 42 Cal.2d 164, 174 [266 P.2d 5].[¶] JUDICIAL TIP: In selecting the appropriate punishment, the court should weigh the effect of any mitigating circumstances. [Citations.]" (Benchguide, *supra*, § 3.29, p. 3–31.)

Other available practice guides explain not only the general rules and procedures, but precisely what must be proven at an indirect contempt proceeding. For example, one leading practical treatise distills it this way, in bullet point fashion: "In indirect contempt proceedings based on disobedience of a prior court order, a valid judgment must meet 'strict requirements.' Each of the following must be established:

- Facts establishing court's *jurisdiction* (e.g., personal service or subpoena, validity of court order allegedly violated, etc.);
- *Defendant's knowledge* of the order disobeyed;
- Defendant's *ability to comply;* and
- Defendant's *willful disobedience* of the order."

(Wegner et al., Cal. Practice Guide (The Rutter Group 2009) § 12:432, p. 12–88.)

The other leading practical treatise lists the same four issues. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009), § 9:712, p. 9(ll)–48.3.) And, later elaborating on the third issue, it says this: "Ability to comply is sometimes obvious, particularly where the violation is of a strictly prohibitory injunction. But in any case, it must be proved by competent evidence." (Weil & Brown, *supra,* § 9:724, p. 9 (ll)–48.8.) "The burden of proof is on the *moving party* to prove the respondent's ability to comply (rather than on the respondent to prove inability)." (*Id.* at § 9:724.1, p. (ll)48.8.)

****883 The Contempt Proceedings**

As noted, third parties initiated contempt proceedings on May 30, 2007, by submitting an affidavit of facts allegedly constituting contempt. Represented by a major law firm, third parties filed an "Order to Show Cause and Affidavit for Contempt." The factual showing in the affidavit included a lengthy attachment and five exhibits, providing evidence of third parties' unsuccessful attempts to negotiate a settlement of the issue, and to recover the sanctions award.

On July 16, 2007, the matter came on for arraignment before Judge Cretan, the judge who had issued the sanction order. Petitioner appeared on his own ***1161** behalf and requested the services of a public defender. Judge Cretan paused the proceeding to have petitioner fill out a financial statement, and then questioned petitioner concerning it. Petitioner acknowledged that he had social security income, but that that he received "very, very little" income from his legal practice and had been sick. Apparently satisfied with petitioner's inability to pay for counsel, Judge Cretan ruled that it would appoint a private defender[2] to represent petitioner, which he later did. Asked how he pled, petitioner reaffirmed he was making a special appearance, so Judge Cretan entered "a denial or not guilty plea on [petitioner's] behalf." This was Judge Cretan's last involvement in any aspect of any contempt proceeding.

Petitioner petitioned this court for a writ of mandate or prohibition on July 17, 2007. After full briefing, we denied that petition on August 17, 2007.

Third parties resumed the contempt proceedings on July 3, 2008, proceeding under Code of Civil Procedure sections 1209, subdivision (a)(5) and 1218, subdivision (a), and the matter came on for hearing on July 10, 2008. Third parties were represented by counsel, as was petitioner, by his court-appointed counsel. The hearing began with counsel for third parties adverting to an in-chambers discussion:

"There was a pending discussion before your Honor on the issue of ability to pay and whether that is an affirmative defense which Mr. Koehler has to prove or whether that is part of our case in chief. And I believe your Honor gave us her tentative thoughts in chambers on that." After brief colloquy, the court responded, "It's the court's view, and I think I've indicated this in chambers, and we can certainly put all the arguments on the record, it is not your burden to prove that. That is an affirmative defense in the court's mind, and you will have plenty of opportunity to address that issue, Mr. Demeester. But it is an affirmative defense if presented by the citee, the defendant, or a lack of ability to pay. And then that becomes a different issue. So that's the court's view."

Third parties presented documents and testimony demonstrating that Judge Cretan had issued a valid order in November 2006, requiring petitioner to pay $10,000 as a discovery sanction; that petitioner was aware of this order; and that he had made no payments in compliance with it.

Petitioner cited to a different order issued by Judge Cretan, this on December 6, 2006, requiring wife—and only wife—to pay $10,000 in ***1162** sanctions under Family Code section 271, arguing that that order recited an ambiguity that relieved him of his obligation under the November 2006 ****884** order. Petitioner also argued that it was the burden of the moving parties to establish that he had an ability to pay the sanction, and that they failed to prove that ability or his willful disobedience of that order. The trial court ruled that the December 2006 order was irrelevant to the contempt proceedings, as it did not pertain to petitioner, and did not vacate or modify the November 2006 order.[3] Significantly, the trial court also ruled "that ability to pay is an affirmative defense that can be presented by defendant, and that has not been done here."

At the conclusion of the hearing, the trial court found petitioner in contempt for failing to comply with the November 2006 order. It then considered arguments regarding the appropriate punishment, found that a fine would not likely coerce petitioner into compliance (given that he had not paid any part of the sanction specified by the November 2006 order), and sentenced him to five days in jail, with a surrender date of August 23, 2008, and with a recommendation that he be able to complete his sentence through a work program in his home county, Riverside.

At some point, petitioner applied to the Riverside County sheriff's office to participate in a work release at their jail and on August 21, was advised to return on Tuesday, August 26, rather than August 23. In the mid-afternoon of August 25, 2008, the day before he was to return to jail, and representing himself, petitioner filed a belated petition

for writ of habeas corpus in this court, which we denied the next day. Petitioner served the five-day jail sentence.

On February 24, 2009, a second contempt proceeding was initiated via an "Order to Show Cause Re: Contempt." The order to show cause has no counsel of record, and is signed by the trial court; it is not under oath. The record does not indicate what caused this second contempt proceeding to be generated, and we assume the court generated it on its own accord.

The order to show cause is four short paragraphs, and begins, however imprecisely, as follows: "On November 27, 2006, discovery sanctions of $10,000 payable to this court on or before January 30, 2007, were imposed against Henry James Koehler, counsel for Respondent in this matter, by the Honorable Clifford V. Cretan pursuant to Family Code section 271.[4] As of *1163 February 24, 2009 those sanctions have not been paid." The fourth paragraph concludes with this: "Note that all of the elements of contempt were found true at the contempt proceedings against Henry James Koehler on July 10, 2008. Therefore, there is no need for an initiating affidavit in this new contempt proceeding. The factual findings made at the conclusion of the July 10, 2008 hearing have been substituted for an initiating affidavit for this new order to show cause re: contempt."

The contempt hearing was held on March 25, 2009, as ordered. There was no appearance on behalf of third parties. Petitioner was represented by new (apparently still court-appointed) counsel, who had substituted in and was "specially appearing ... for the purpose of contested [sic] jurisdiction of this hearing." Counsel challenged the court's jurisdiction on the **885 basis that the reference to Family Code section 271 and the statement that sanctions were payable to the court were inaccuracies in the order to show cause, and that petitioner was never properly joined as a party. The trial court responded as follows:

"THE COURT: Well, I mean, Mr. Koehler knows we had a huge hearing on this where he was found in contempt. So if the court misstated that it was payable to this court or to Lucky Strikes Farm in any event, that's—that may just be—that doesn't affect these proceedings, counsel. [¶] He knows what the issue is before the court. He was ordered to pay a $10,000 discovery sanction by the trial court. We had a hearing on it. He was found in contempt of court. And he hasn't as yet paid that $10,000. So that's why we are here today."

Petitioner's counsel responded that he believed "the need for accuracy in the order to show cause re contempt is jurisdictional," and then complained that petitioner was improperly joined in the case. After some colloquy about the joinder issue, the trial court said it would take a "brief recess and just look at the complete file that is in chambers." The court returned a short time later, and the following ensued:

"THE COURT: Very well. Thank you. The court was just in recess very briefly. [¶] Counselor, I was taking a look at the file, and unfortunately I think you are incorrect on both issues. According to the minutes of the court on November 27, 2006, the minutes of the court clearly say sanctions in the sum of $10,000 dollars are imposed against Henry James Koehler per Family Code section 271 to be paid to the court on or before January 30, 2007. So that's as to the first issue.

"MR. CORDLE: I'm sorry, 271 is only against parties as a matter of law.

"THE COURT: I am just reading to you the exact language in the minutes which the court adopted in the re contempt."

*1164 Two pages later the trial court affirmed that "we are two years and ... four months into that order where [petitioner] was ordered by Judge Cretan to pay $10,000 in discovery sanctions pursuant to Family Code section 271 to be paid to the court...."

Petitioner's counsel pressed on, concluding that there was a "defective order" to show cause re contempt, and objected to "any order for contempt based on payment of 271 sanctions ... as such 271 sanctions are not enforceable against him as a matter of law."[5] It was all to no avail.

The trial court amended the order to show cause to reflect that the sanctions were payable to third parties. It then found that the elements of contempt were previously established at the July 10, 2008 hearing, and that petitioner had still refused to pay the sanctions award. The trial court again sentenced petitioner to another five days of confinement with a self-surrender date. Petitioner served that second five-day sentence in early April 2009.[6]

**886 On May 14, 2009, another "Order to Show Cause Re: Contempt" was filed, once again signed by the trial court. As before, the order to show cause appears to be generated by the court itself. As before, it is not under oath. As before, it was four short paragraphs. As before, it began—incredibly in light of all that transpired—by stating that the trial court had imposed the sanctions "pursuant to Family Code section 271." And as before, it concludes with this: "Note that all of the elements of contempt were found true at the contempt proceedings against Henry James Koehler on July 10, 2008. Therefore, there is no need for an initiating affidavit in this new contempt proceeding. The factual findings made at the conclusion of the July 10, 2008 hearing have been substituted for an initiating affidavit for this new Order to Show Cause Re: Contempt."

Petitioner filed opposition and on May 27, 2009, made a "special appearance" before the trial court, this time in propria persona. The trial court inquired as to whether petitioner had paid the $10,000. Petitioner refused to answer, asserting his constitutional rights. Petitioner objected to the form of service of the notice of hearing, specifically noting that he had not been personally served. He argued that the matter should be continued to permit him to obtain legal representation and witnesses. And he also argued that the two previous sentences for contempt had been punitive, not coercive.

*1165 The trial court explained that the court mailed petitioner a notice of hearing, consistent with its past practice. It also stated that the elements of contempt were established at the July 10, 2008 hearing, and that the time had passed for him to challenge the validity of the November 2006 order. Petitioner stated that he was tendering to the court a motion to quash based on "triple jeopardy" and the running of the statute of limitations. The trial court rejected all this, and stated: "This is a continuing contempt for this court," and again sentenced petitioner to five days in jail. The hearing lasted all of eleven minutes, and generated a transcript eight pages in length.

On May 29, 2009, petitioner filed in this court a petition for a writ of habeas corpus. That same day we issued a stay of the trial court's contempt order and a request for informal opposition. Our request was served on several parties, including third parties (as real parties in interest), and the Attorney General, on whom we customarily serve all habeas corpus petitions. No opposition was filed, and on July 28, 2009, we issued an order requesting the trial court to show cause why the relief sought in the petition should not be granted. Following that order, on August 14, 2009, we received "San Mateo County Superior Court's Return" to the order to show cause, filed by a private law firm, not county counsel. We appointed counsel for petitioner, who filed a traverse, following which we heard oral argument.

DISCUSSION

Preliminary Matters

As noted, petitioner has filed a petition for habeas corpus. As also noted, the Superior Court has appeared on its own behalf. This state of affairs leads to two preliminary issues: (1) whether in light of petitioner's out-of-custody status he has filed the appropriate writ; and (2) whether the return has been filed by the proper party.

While habeas corpus is obviously the appropriate remedy for an imprisoned contemnor (see *In re Buckley* (1973) 10 Cal.3d 237, 259, 110 Cal.Rptr. 121, 514 P.2d 1201), petitioner is not imprisoned. **887 However, prohibition lies to determine whether a superior court has imposed an invalid contempt order (*Lister v. Superior Court* (1979) 98 Cal.App.3d 64, 69, 159 Cal.Rptr. 280; *Hanson v. Superior Court* (2001) 91 Cal.App.4th 75, 80, 109 Cal.Rptr.2d 782; see generally *Bellas v. Superior Court* (2000) 85 Cal.App.4th 636, 653, 102 Cal.Rptr.2d 380), and we will proceed by treating the petition here as one for prohibition.

Turning to the return filed by the superior court, there is a real question whether it is proper, and the court's opposition properly before us. It *1166 has been held that "Absent issues which directly impact the efficient operation of the court or the court's budget, the respondent court is not justified in taking an adversary role in writ proceedings." (*Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572, 576, fn. 6, 105 Cal.Rptr.2d 896.) This is based on the principle that a superior court generally does not have standing to appear in this court to defend its own rulings. (See *Neblett v. Superior Court* (1948) 86 Cal.App.2d 64, 66–67, 194 P.2d 22 [annulling contempt order challenged by

petition for writ of certiorari but dismissing petition as to individual judge]; see also *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1066, fn. 4, 103 Cal.Rptr.2d 751, 16 P.3d 166; and 8 Witkin, Cal. Procedure (5th ed. 2008) Extraordinary Writs, § 166, pp. 1073–1074.)

"Although rare, respondent court may oppose the writ petition when: '(1) the real party in interest did not appear; and (2)"[t]he issue involved directly impacted the operations and procedures of the court or potentially imposed financial obligations which would directly affect the court's operations." ' " (*Settlemire v. Superior Court* (2003) 105 Cal.App.4th 666, 669, 129 Cal.Rptr.2d 560.) While the setting here meets the first but not the second component of this exception, rather than request further briefing on these questions—and cause even further expense to the superior court—we follow the approach in *Grant v. Superior Court* (2001) 90 Cal.App.4th 518, 108 Cal.Rptr.2d 825, a judicial disqualification case. There, the court concluded that while the superior court lacked standing to defend itself, "because respondent court's brief is of assistance to this court and because we recognize the impact of disqualification orders upon the court's case management system, we will consider the court's return as an amicus curiae brief filed in support of real parties in interest." (*Id.* at p. 523, fn. 2, 108 Cal.Rptr.2d 825.)

We thus turn to the merits of the matter—and conclude that petitioner's position is well taken.

The Standard of Review

As our Supreme Court has often noted, "In the review of a contempt proceeding 'the evidence, the *findings,* and the judgment are all to be strictly construed in favor of the accused [citation], and no intendments or presumptions can be indulged in aid of their sufficiency. [Citation.] If the record of the proceedings, reviewed in the light of the foregoing rules, fails to show affirmatively upon its face the existence of all the necessary facts upon which jurisdiction depended, the order must be annulled.' (*Hotaling v. Superior Court* (1923) 191 Cal. 501, 506 [217 P. 73], italics added.)." (*Mitchell v. Superior Court, supra,* 49 Cal.3d at p. 1256, 265 Cal.Rptr. 144, 783 P.2d 731.) Thus, there is no presumption of regularity in contempt proceedings (***1167** *In re Wells* (1946) 29 Cal.2d 200, 201, 173 P.2d 811; *Powers v. Superior Court* (1967) 253 Cal.App.2d 617, 619, 61 Cal.Rptr. 433; *Petition of Mancini* (1963) 215 Cal.App.2d 54, 56, 29 Cal.Rptr. 796), nothing can be implied in ****888** support of an adjudication of contempt (*In re Scroggin* (1951) 103 Cal.App.2d 281, 283, 229 P.2d 489), and the record must be strictly construed in favor of petitioner, the one found in contempt. (*Raiden v. Superior Court* (1949) 34 Cal.2d 83, 86, 206 P.2d 1081.)

The Requisite Procedures Were Not Followed, the Applicable Law Was Not Applied

We begin with discussion of what occurred at the third hearing, on May 27, 2009, which began at 10:44 a.m. and was over by 10:55. Again, there was no appearance by third parties. Petitioner appeared, this time in propria persona. After satisfying itself that petitioner could hear, [7] the trial court started with this:

"THE COURT: Okay. Thank you, sir. Well, Mr. Koehler, you are before the court on an in re contempt for the third time for failure to pay a $10,000 discovery sanction that was payable to Lucky Strike Farms, Inc. that was the order of the trial court on November 27, 2006; was to be paid by January 30, 2007.

"We had a hearing in this matter in July of 2008 and I brought you before the court twice before and sentenced you to county jail on two prior occasions. This is the third time I've brought you back before the court. Have you paid that $10,000 discovery sanction, sir?

"THE DEFENDANT: Without counsel here obviously that would be a Fifth Amendment testimony matter. I am making a special appearance. I take it the court has gotten and read the motion to quash today, but my offer is and the court read it is that I'm willing to accept service because it wasn't personally served. I would accept it today with the condition that I get the required 16–day court time under CCP 1005. Did the court get a chance to read that?

"THE COURT: Yes. The last time you were in court you had an attorney with you, that was Mr. Cordle and at the previous two times. We also mailed you the notice for hearing to appear before the court as with your attorney, which is the same thing we did this time, so this time you're objecting that the court has to personally serve you is your position; is that correct, Mr. Koehler?

***1168** "THE DEFENDANT: I believe that's the law. That's CCP 1016 is the *Cedars–Sinai* [*Imaging Medical Group v. Superior Court* (2000) 83 Cal.App.4th 1281, 100 Cal.Rptr.2d 320,] case, but you notice that on the last page of that, I've said that as an officer of the court, I'm not trying to hide and I'm more than willing to accept service of it today, personal service if I get in exchange for the required 16 court days that I would get anyway under a motion.

"THE COURT: Thank you, sir. The court is going to respectfully deny your request....

"In any event, the court has already conducted a hearing in this matter and found you in contempt of court for failure to abide by a ruling of the trial court back in 2006. Again, this is the third time you've been before the court. Very well, sir, is there anything else you'd like to say?

"THE DEFENDANT: Yes.... Clearly this is a third trial. It's a separate trial. It is not a continuing trial; it is a third one. The notice at any rate even if it had been served correctly on May 14, only gave me eight court days, this is the 8th ****889** court day; and therefore, I make my motion to have my 16 court days, which would continue this matter, I believe until June 15 so that I have the necessary notice and opportunity for obtaining counsel and obtaining witnesses and evidence and so on.

"THE COURT: Sir, I think you misunderstand the procedure before the court. We've already had a hearing on this matter and all of the elements of contempt were found true on July 10 of 2008. You had a hearing, you were represented by counsel, and the court found you in contempt; therefore, there is no need for an initial hearing or affidavit in these new contempt proceedings. We don't have hearing after hearing on the same facts, sir. You were found guilty of contempt for failure to pay a $10,000 discovery sanction as an attorney of law, so you misunderstand the law, sir. It would make no sense to have a hearing each and every time on the very same issue. We have done that already....

"Very well. Your objections are noted for the record, sir, and the court is going to sentence you to five days in the county jail....

"THE DEFENDANT: May I?

"THE COURT: We've been down this road two times before, sir, and it is regretful that the court continues to have to do this. The court takes no joy in doing this; however, this is the only way that the court can enforce its orders in this matter."

***1169** A minute order was issued that day which provided in its entirety as follows: "Attorney Koehler argues that he was not properly served in this matter. He requests a continuance and offers to accept service in court today. [¶] Attorney Koehler's Motion to Continue is DENIED. [¶] THE COURT SENTENCES HENRY JAMES KOEHLER FOR FAILURE TO PAY THE $10,000.00 COURT ORDERED SANCTION OF 11/27/06 AS FOLLOWS: [¶] SERVE 5 DAYS IN COUNTY JAIL. [¶] SURRENDER TO SAN MATEO COUNTY JAIL ON 6/2/09 AT 10AM. [¶] SHERIFF'S WORK PROGRAM IS NOT RECOMMENDED." That same day the court filed an order remanding petitioner into custody.

The third contempt proceeding was improper in at least four particulars.

First, it was not properly begun. It has long been the rule that the filing of a sufficient affidavit is a jurisdictional prerequisite to a contempt proceeding. (See *Warner v. Superior Court* (1954) 126 Cal.App.2d 821, 824, 273 P.2d 89.) As our Supreme Court put it in *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 532, 247 Cal.Rptr. 378, 754 P.2d 724, "[Code of Civil Procedure [s]ection 1211 requires that an affidavit be presented to the judge reciting the facts constituting contempt. No such affidavit was presented.... Thus, the Commission was correct in concluding that Judge Ryan's contempt order was procedurally invalid." In short, indirect contempt requires there be an initiating affidavit, and without one any contempt order is void. (*In re Cowan* (1991) 230 Cal.App.3d 1281, 1286–1287, 281 Cal.Rptr. 740.)

Second, a contempt citation must be served personally. Service of an order to show cause to bring a party into contempt is insufficient if made by mail on the party's attorney of record. This was the express holding of *Cedars–Sinai Imaging Medical Group v. Superior Court, supra,* 83 Cal.App.4th at p. 1287, fn. 6, 100 Cal.Rptr.2d 320—the very case petitioner cited to the trial court.

Third, as the Benchbook states the rule, "Because the contemptuous act **890 occurred outside the judge's presence, a valid order and judgment of indirect contempt must cover the following elements: the issuance of an order, the contemner's knowledge of the order, the contemner's ability to obey it, and the contemner's willful disobedience. See *In re Jones* (1975) 47 Cal.App.3d 879, 881 [120 Cal.Rptr. 914]. The order and judgment must state evidentiary facts supporting a finding of each of these elements, except that it need not state such facts in support of the finding of willfulness, which may be inferred from the circumstances." (Benchbook, § 17.112, p. 458.) The minute order here falls short in all respects.

Fourth, the trial court responded to petitioner's argument of "triple jeopardy" by asserting that each day that petitioner had not paid the $10,000 *1170 was "technically ... a new contempt." This was wrong. The preclusion of multiple punishment in Penal Code section 654 applies in civil contempt, to the extent the punishment is punitive in nature. (See *Mitchell v. Superior Court, supra,* 49 Cal.3d at p. 1246, 265 Cal.Rptr. 144, 783 P.2d 731; *Conn v. Superior Court, supra,* 196 Cal.App.3d at p. 786, 242 Cal.Rptr. 148; *In re Farr* (1976) 64 Cal.App.3d 605, 614–615, 134 Cal.Rptr. 595.) *Conn* is on point. There, while upholding the contempt as proper, the court held it was improper to impose multiple punishments for what was basically a single disobedience, although continuing in nature. And the disobedience there? A refusal to return privileged documents. The test is whether there are " 'separate insults to the authority of the court, not whether the insults happened to occur on the same or different days.' " (Conn, supra, 196 Cal.App.3d at p. 786, 242 Cal.Rptr. 148, citing *Reliable Enterprises, Inc. v. Superior Court, supra,* 158 Cal.App.3d at p. 621, 204 Cal.Rptr. 786.) In sum and in short, the third contempt was improper, both procedurally and substantively.

Petitioner has, as noted, already served two five-day sentences, so any claim as to the impropriety of the first or second contempt proceeding is not before us. However, since the order to show cause involved in the third contempt—however inadequate it was—referred to the earlier proceedings, and because the brief hearing on the third contempt referred to earlier proceedings, any defect in any earlier proceeding is pertinent. And defect there was, especially in the proof required.

As noted, from the outset petitioner's counsel took the position that third parties had the burden to prove that petitioner had the ability to pay. Third parties' position was that inability to pay was an "affirmative defense." The trial court expressly agreed. The law is contrary. (*Mitchell v. Superior Court, supra,* 49 Cal.3d at p. 1256, 265 Cal.Rptr. 144, 783 P.2d 731; *Anderson v. Superior Court* (1998) 68 Cal.App.4th 1240, 1245, 80 Cal.Rptr.2d 891; *In re Cassil* (1995) 37 Cal.App.4th 1081, 1088–1089, 44 Cal.Rptr.2d 267.)[8] Thus, there was no substantial evidence that petitioner had the ability to comply with the order, so the contempt "must be reversed and annulled." (*In re Cassil, supra,* 37 Cal.App.4th at pp. 1088–1089, 44 Cal.Rptr.2d 267.)

Not only did the trial court hold petitioner in contempt, but on May 27, 2009, it also caused a discipline referral form to be submitted to the State Bar.[9] Despite all **891 that had occurred, the form inexplicably stated that the referral was "for a" $10,000 discovery sanction imposed against Mr. Koehler on November 27, 2006, pursuant to [Family Code] section 271." And, the form said, the "nature of the criminal offense" was petitioner's "contempt of *1171 court failed to comply with November 27, 2006 court order." This referral apparently had a drastic effect, as at oral argument his counsel represented that petitioner has been "disbarred."[10]

Some Closing Observations

One of the many inexplicable aspects of this case is how a person deemed sufficiently impecunious to be entitled to appointed counsel can be held in contempt and incarcerated for failure to pay a $10,000 fine—indeed, on the trial court's theory, repeatedly so held and repeatedly incarcerated, apparently ad infinitum.

Quoting various sources, Judge Rothman emphasizes the "importance [to judges] of knowing the law of contempt," saying this: "The Commission on Judicial Performance has stated that, "[b]efore sending a person to jail for contempt, or imposing a fine, judges are required to provide due process of law, including strict adherence to the procedural requirements contained in the Code of Civil Procedure. Ignorance of those procedures is not a mitigating but an aggravating factor. [¶] A judge, therefore, is obliged to know proper contempt procedures.

'The contempt power, which permits a single official to deprive a citizen of his [or her] fundamental liberty interest without all of the procedural safeguards normally accompanying such a deprivation, must be used with great prudence and caution. It is essential that judges know and follow proper procedures in exercising this power, which has been called a court's 'ultimate weapon.' " (Rothman, *supra,* § 4.03 p. 156, fns. omitted.) To put Judge Rothman's strong admonitions in the vernacular, any trial court exercising the "ultimate weapon" must be absolutely certain that it not only knows the law, but that it has also dotted all the *i's* and crossed all the *t's.* What happened here was a far cry.

Beyond what we gleaned from the correspondence mentioned above, we do not know much of what occurred in the course of petitioner's representation of wife below. Maybe petitioner was difficult to deal with. Certainly he ignored the $10,000 sanction (assuming he was able to pay it). Perhaps he was even contumacious. But whatever the characterization of petitioner's conduct, he, like all others, is entitled to the due process the law requires. This he did not get.

*1172 DISPOSITION

Petitioner's petition is treated as one for prohibition, and is granted, and the order of contempt is reversed and annulled.

We concur: KLINE, P.J., and HAERLE, J.

All Citations

181 Cal.App.4th 1153, 104 Cal.Rptr.3d 877, 10 Cal. Daily Op. Serv. 1737, 2010 Daily Journal D.A.R. 2053

Footnotes

1 Papazian Properties Company is owned by Lucky Strike Farms, Inc., Papazian Investment Company and Gilbert and Margaret Papazian, who are the parents of husband in the divorce case.

2 San Mateo County does not have a public defender. Making the determination that petitioner was entitled to court-appointed counsel, Judge Cretan necessarily determined that petitioner was not "financially able to employ counsel and qualifie[d] for the services" of the public defender. (See Gov.Code, § 27707.)

3 In our April 2009 affirmance of the trial court's three orders in the dissolution action, we agreed with the ruling of the trial court and specifically stated that the December 2006 order was either mistakenly filed or incorrectly prepared by the trial court, and directed it to correct that order to conform to the November 2006 order.

4 The Family Code section was not involved, as the trial court had already ruled.

5 It is not disputed that Family Code section 271 sanctions can be assessed only against a party.

6 On May 27, 2009, after he had served the five days in jail, petitioner filed in this court a petition for habeas corpus. We summarily denied the petition the next day, as we lacked jurisdiction. (See *Maleng v. Cook* (1989) 490 U.S. 488, 491–493, 109 S.Ct. 1923, 104 L.Ed.2d 540 [habeas corpus does not lie for petitioner who is no longer in actual or constructive custody].)

7 Petitioner is 75 years old, has a hearing impairment, and frequently appears in a wheelchair in his court appearances.

8 An exception to this is in an order for child support, where inability to pay is an affirmative defense. (*In re Ivey* (2000) 85 Cal.App.4th 793, 798, 102 Cal.Rptr.2d 447.)

9 The form was actually submitted by her courtroom clerk, with the trial court listed as the person to be contacted for further information.

10 The official State Bar website lists petitioner's status as "Not Eligible to Practice Law." (State Bar of California, Attorney Search, at < http://www.calbar.ca.gov/state/calbar/calbar—home.jsp> [as of Feb. 4, 2010].)

End of Document

EXHIBIT 3

COMPUTERLAW GROUP LLP
ATTORNEYS AT LAW
401 FLORENCE STREET
PALO ALTO, CALIFORNIA 94301
COMPUTERLAW.COM

TELEPHONE
(650) 327-9800

FAX
(650) 618-1863

December 10, 2018

Via Email

Laura E. Miller
Durie Tangri LLP
217 Leidesdorff Street
San Francisco, CA 94111
lmiller@durietangri.com

Re: Six4Three, LLC v. Facebook, Inc. et al.
San Mateo Super. Ct. Case No. CIV 533328

Dear Ms. Miller:

I was forwarded a copy of your email regarding Mr. Scaramellino's phone. Why did you not copy me (who was actually at the offices of Stroz Friedberg all afternoon on Friday) on that message?

As you may know, during the meeting on Friday afternoon, I personally brought up the question of whether Mr. Scaramellino's personal phone was subject to Friday's Order. When no one suggested that Mr. Scaramellino's phone was subject to that, or any other, Order, during the meeting on Friday afternoon, and no request for the phone was made, I understood that the matter was closed. That understanding was confirmed at the end of the meeting when Mr. Riehl of Stroz Friedberg confirmed, in response to your question as I recall, that there was nothing left for my clients to provide at that meeting.

That said, Mr. Scaramellino is willing to cooperate in the preservation of data on his phone, but we request that it be treated similarly to Mr. Kramer's, as reflected in the November 30 Order and the Court's statements that it would allow Mr. Scaramellino to continue to be able to work. His ability to work is something that requires his mobile device.

Therefore, we propose the Mr. Scaramellino meet tomorrow, Tuesday, December 11, 2018, in or near Port Jervis, New Jersey with a representative of Stroz Friedberg (we understand Preston Miller is located in New Jersey), who will image and then return to Mr. Scaramellino his phone at that same meeting. Please advise if that is acceptable.

Very truly yours,

Christopher Sargent

EXHIBIT 4

Jack Russo (Cal. Bar No. 96068)
Christopher Sargent (Cal. Bar No. 246285)
COMPUTERLAW GROUP LLP
401 Florence Street
Palo Alto, CA 94301
(650) 327-9800 office
(650) 618-1863 fax
jrusso@computerlaw.com
csargent@computerlaw.com

Attorneys for Third Parties
THEODORE KRAMER and
THOMAS SCARAMELLINO

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

Six4Three, a Delaware limited liability company,

Plaintiff;

v.

Facebook, Inc., a Delaware corporation; **Mark Zuckerberg**, an individual; **Christopher Cox**, an individual; **Javier Olivan**, an individual; **Samuel Lessin**, an individual; **Michael Vernal**, an individual; **Ilya Sukhar**, an individual; and **Does 1–50**, inclusive,

Defendants.

Case No. CIV533328

Assigned for all purposes to Hon. V. Raymond Swope, Dep't 23

DECLARATION OF THOMAS SCARAMELLINO

Date:	February 22, 2018
Time:	9:00 a.m.
Department:	23
Action Filed	April 10, 2015
Trial Date:	None set

I, Thomas Scaramellino, declare under penalty of perjury as follows.

1. My name is Thomas Scaramellino. I am over the age of 18. I make these statements in support of modifying the Court's Order of February 7, 2019 requiring my personal appearance at the hearing to be held on February 22, 2019. I have personal knowledge of the matters stated in this declaration, and I believe those matters to be true.

2. I am a software executive and investor. I am currently a Director of TallyGo, Inc., a navigation software startup, and have previously held roles as CEO or Director of other software startups, all of which have been headquartered in New York, Boston or Los Angeles. In my role as a software executive and investor, I advise and invest in other software startups through limited liability syndicate investment vehicles, a common practice in the software investment community.

3. One of these syndicate investment vehicles, #2 LLC, an investment entity located exclusively in New York, invested in six4three, LLC ("643" or "Plaintiff") in late 2012 and 2013 to build a computer vision software business. In conjunction with #2 LLC's investment, I agreed to serve as a business advisor to 643. #2 LLC has no offices in California, no representative, no phone, no fax, no mailbox, and no presence whatsoever there. I currently reside in New York.

4. Since 643's inception, Facebook has engaged in conduct that harmed 643 and which had anti-competitive and exclusionary motives. Further, during the course of 643's software development, I was informed by 643's founders that Facebook ignored the privacy controls users set on their data when Facebook sent the data through its application program interfaces ("APIs"), and that 643 required additional funding in order to build work-arounds that would enable 643 to respect user privacy. I found this to be extremely concerning and expressed my reservations to 643's founders, who invested significant capital and labor in attempting to respect user privacy on the Facebook Platform. I also tried to raise this issue with Facebook, but Facebook's representative refused to communicate with me.

5. Moreover, in April 2015, Facebook made significant changes to the various APIs that make up the Facebook Platform, removing public access to over 50 APIs that were widely used by over 40,000 companies in the software industry, including 643. Facebook made these

changes under the stated justification that the APIs were "rarely used" in an announcement entitled "The New Login and Graph API 2.0". It was obvious to me at the time based on nearly a decade of experience in the software industry that this was false and that Facebook was misrepresenting its reasons for making these changes. Facebook subsequently claimed that it had removed these APIs for privacy reasons and (allegedly) to protect its users. Based on my experience in the software industry and my knowledge of other businesses that relied upon Facebook Platform, I strongly suspected that Facebook was in fact the culprit violating user privacy and further that Facebook was managing its Platform as an illegal scheme whereby it represented the Platform as a level competitive playing field available on fair, reasonable and non-discriminatory terms to all companies while secretly causing reliance of tens of thousands of companies on these public representations in order to extract financial consideration from them in a deceptive manner. I suspected that, although Facebook told companies publicly there was no requirement to purchase advertising, that Facebook was secretly shutting companies down unless they did in fact purchase an exorbitant amount of advertising, and that Facebook was blaming companies for Facebook's own privacy violations in order to get away with this anti-competitive conduct. Thus, companies approached by Facebook who agreed to Facebook's advertising spend requirements were given special treatment, including obtaining user data without user consent or adherence to privacy controls; those who did not were cut off. Needless to say, 643 was cut off; the larger companies who agreed to Facebook's arbitrary advertising spending threshold (including, for example, Tinder and Netflix) were not. These facts have all been publicly reported and Facebook has now finally admitted to many of them, like its ongoing use of secretive whitelist agreements to funnel user data to companies without consent (as reported by *The New York Times* on December 18, 2018), but Facebook nonetheless continues to conceal many of these facts from the public, including in testimony provided by Mark Zuckerberg to the United States Congress.

6. In light of my strong suspicions surrounding Facebook's conduct and given that platform economies[1] were relatively novel at the time, I felt it was significantly in the public interest to understand how the Facebook Platform, one of the largest platform economies in the world, was managed and whether Facebook's internal conduct contradicted its public representations.

7. On or about April 2015, 643 was forced to shut down its business due to these very same API changes made under the public name "Graph API 2.0". Mr. Kramer was upset and approached me about filing a lawsuit against Facebook. I then approached Mr. Godkin at Birnbaum & Godkin as I had a pre-existing attorney-client relationship with him.

8. As Mr. Godkin affirmed in Paragraph 6 of his Declaration of June 20, 2017, he explained to me that his law firm was small and had limited resources, particularly compared to the resources Facebook could bring to bear. As a result, I agreed to volunteer a portion of my time to Birnbaum & Godkin as a law clerk and later to study for the California Bar Exam. Mr. Godkin was aware that I had legal training, having obtained my J.D. from Yale Law School in 2008 and having served as a law clerk in the United States Attorneys' Office for the Southern District of New York, in the offices of the Governor of New York, and at the law firm of Davis, Polk & Wardwell. Mr. Godkin and I entered into a formal legal clerkship arrangement whereby I would volunteer my time under Mr. Godkin's supervision. I have not been compensated in any manner by Birnbaum & Godkin except through the training and education they have provided during my clerkship with them and in the interactions with them and with California local counsel for 643 as I also studied (and ultimately took and passed) the California Bar Examination, as well as the California Ethics Examination. All my activities have been performed under the direct supervision of Mr. Godkin and California local counsel for 643. At all times, any work product developed by me has been reviewed by one or more licensed attorneys and has been incorporated into a final work product authorized and filed by a licensed attorney

---

[1] Platform economies like those managed by Apple, Google, Microsoft and many other technology companies include "collections of economic actors not controlled by the platform owner…such as the many developers (both individuals and companies) that create apps for Facebook." *See* https://en.wikipedia.org/wiki/Platform_economy#The_platform_business_model

who is admitted before this Court and/or who had *pro hac vice* rights granted by this Court. I never signed any pleadings nor made any appearances in any proceedings before this Court on behalf of 643. I did interact with this Court on December 7, 2018, as requested by the Court. I thank the Court for allowing me that opportunity.

9. During the course of the litigation, I assisted in the review of Facebook's production and prepared summaries and briefs in a Dropbox folder that I believed was controlled by Birnbaum & Godkin under 643's administrative Dropbox account. This approach was decided upon by the legal team in lieu of permitting me access to the Birnbaum & Godkin file server. Birnbaum & Godkin supervised the transfer of Facebook's documents into this folder. My document review and preparation of summaries was performed under the direction of Birnbaum & Godkin. To the best of my knowledge, 643 and Birnbaum & Godkin took reasonable steps to ensure that Mr. Kramer could not access documents from the Dropbox folder or any of the sub-folders created therein. My placing of documents in that folder, as described in Mr. Godkin's Letter to the Court of November 29, 2018, was in the ordinary course of my work as a law clerk for Birnbaum & Godkin and is a practice I continuously engaged in for approximately two years under the supervision of Birnbaum & Godkin. I was ill and in bed at the time of the events of late November 2018, but nonetheless made my best efforts to assist Birnbaum & Godkin and local counsel once those events transpired in London right before Thanksgiving Day. Until that time, I believed Mr. Kramer did not have access to that Dropbox folder as Birnbaum & Godkin and Mr. Kramer had affirmed to me that Mr. Kramer could not access that folder. To the best of my knowledge, neither Mr. Kramer nor Birnbaum & Godkin believed that Mr. Kramer had access to that Dropbox folder.

10. Beyond our control (and certainly beyond my control), it is now apparent as a result of the events at Parliament in London in late November, that at least some of the Dropbox sub-folders did not have the proper permission settings or that the organization of the sub-folders in the Dropbox account was not synced fully with the organization of the folders on the personal computers of the team members who had access to the account, or some other technical issue occurred that modified or undermined what I believed to be the permissions settings which I

always understood were limited to the litigation team. I had no responsibility for any settings in Dropbox.

11. Since the first Order to Produce Documents issued by the Parliament of the United Kingdom, 643 and the legal team have complied fully with Section 16 of the Protective Order and all other Court Orders in providing immediate notice to Facebook, the Court and Parliament of the conflicting orders and giving Facebook an opportunity to seek timely and reasonable relief in the United Kingdom. Facebook declined to seek such relief. To the best of my knowledge, to this day Facebook still has not sought relief or recourse or done anything whatsoever in Parliament or otherwise in the Courts of the United Kingdom notwithstanding that it maintains a substantial presence and multiple offices in the United Kingdom, including two offices in London at 10 Brock Street and 1 Rathbone Square, which is located just 1.4 miles from the United Kingdom Parliament (https://www.facebook.com/facebooklondon/). Why has Facebook taken no action whatsoever? Why did Facebook not have an attorney walk over to Parliament, or at least pick up a phone, the moment it was notified of this issue? Why did Facebook not immediately offer to indemnify and provide for the defense of Mr. Kramer against any actions taken by Parliament against him due to his continued non-compliance with Parliament's Orders? Why has Facebook failed to provide adequate answers to these questions before the Court?

12. From the time the Court issued its Order of November 30, 2018 until I was able to retain counsel on December 5, 2018, I was unable to communicate with the Court, had been divorced from the legal team, and had no representation to protect my rights. During this time, the Court ordered all of my files, accounts, computers, phones and hard drives containing all of my personal, financial, medical, marital, corporate and legal records for the past 15 years seized and imaged by Facebook's forensics firm, Stroz Friedberg, including files and accounts owned by my employer, TallyGo, Inc. and files and accounts used to communicate with my current counsel in this matter, Computerlaw Group, and my personal counsel and corporate counsel on unrelated matters.

13. Further, from November 30, 2018 until December 19, 2018 the Court prohibited me from accessing or using these files and accounts, which has caused substantial harm in the following ways:

(a) I was unable to communicate with my employees, customers, investors, prospective investors and potential acquirers of my employer, TallyGo, Inc., resulting in substantial harm to the business during a critical period of its development when it was in the final stages of a financing and acquisition process;

(b) I was unable and remain unable to access the files and communications necessary to defend myself against Facebook's unfounded accusations against me in light of the fact that Facebook repeatedly asserts that information entirely within the public domain is somehow confidential or highly confidential, and therefore I have been required to delete all of my communications with 643 and its legal team;

(c) I was unable to communicate via email with my personal counsel because the email account I setup to communicate with my personal counsel was also subject to the Court's Order;

(d) For over two months now, 643 has been unable to obtain any assistance during this collateral litigation, to its great prejudice, because I have been divorced from the case and because 643's counsel have informed the Court, 643 and me that they refuse to advocate on behalf of 643;

(e) 643 has been unable to obtain any assistance from the trial team in multiple pending appeals, to its great prejudice, because I have been divorced from the case and because 643's counsel have informed 643 that they refuse to assist appellate counsel in preparing the appeal; thus, no member of the trial team is available to assist 643's appellate counsel in appeals that require significant evaluation and consideration of the substantive merits and evidence (most of which has been designated confidential or highly

confidential by Facebook) submitted in opposition to two anti-SLAPP motions and a sealing motion;

(f) The files seized by Facebook's forensics firm include files subject to confidentiality in other legal matters unrelated to 643, including a case set for trial this year in Delaware Federal Court in which I am a percipient witness; thus, Facebook's forensics firm is arguably now a third party "in possession" of files that are also subject to a different Protective Order in that case, but Facebook's forensics firm has not signed or otherwise agreed to that separate Protective Order of the Delaware Federal District Court (which means nothing should be accessed until compliance with that Protective Order occurs), unfairly placing me in a situation where another set of lawyers could potentially assert that I am in violation of that Protective Order through no fault of my own;

(g) I have been prohibited from communicating with the media and government officials regarding 643's case against Facebook in violation of my First Amendment rights under the United States Constitution.

14. 643's counsel has informed Facebook's counsel, the Court, me and 643 that the legal team has been disbanded, and thus I am not currently a member of the legal team.

15. I do not currently have access to any of Facebook's confidential or highly confidential documents.

16. Facebook has not served any motion for contempt, sanctions or alternative complaint against me personally, and I am not a party to this case. I did not have any opportunity to be heard prior to the sequence of events that has unfolded since late November and which has substantially impaired my rights and privileges under the law. Facebook has not presented any legitimate evidence of wrongdoing on my part as all of the "evidence" Facebook claims I shared directly with the media and government entities is squarely within the public domain and can be found in the public docket of this case on the San Mateo Superior Court website. The Court has not made any determination of wrongdoing on my part. No other member of the legal team has

been subject to a Court order requiring any seizure or imaging of any files, accounts, computers, phones or hard drives.

17. As I am not a party to this case, I am unable to file a motion in this Court or seek a writ or appeal in the Appellate Department of the recent Court Orders that have adversely affected my rights. I am informed by Mr. Kramer that 643 has requested that 643's counsel notice an appeal of the recent Court Orders and that 643 submitted advance payment of the filing fee to notice such an appeal, but that 643's counsel has refused to do so. Thus, 643 currently has no ability to seek judicial recourse regarding the recent Court Orders and may waive its rights regarding such to its great prejudice and through no fault of its own.

18. I have significant parental duties in the month of February, as I have an 18-month old daughter who requires my care, and I do not have the ability as a co-parent on such short notice to make a trip this month to meet with the Court. I can do so by phone if my participation is required. I have no other knowledge at this time to offer the Court other than what was expressed at the December 7, 2018 hearing and what has been set forth above as I have had no substantive communication with 643's counsel since early December 2018.

19. Beyond my personal and family obligations, it is also a substantial burden for me to bear the additional cost of travel to San Francisco for the hearing, as I will lose at least three days of work and will incur at least $2500 of air travel, lodging, and associated expenses. I fully respect the Court, and I am willing to participate by telephone if my participation is required.

20. Beyond the above, I have attempted to assist Mr. Kramer and 643 in its efforts to secure replacement counsel and affirm to the best of my knowledge that 643 is making diligent efforts to secure replacement counsel. 643 has identified a number of firms willing to represent the company on the condition that they are provided adequate time to get up to speed in the case. 643 has ***not*** found any counsel willing to step in to the case with the prospect of having only a matter of weeks to prepare for the looming terminating sanctions motion and contempt motions Facebook has indicated it intends to file and yet, remarkably, has not filed for months now.

21. At the time of the events in the United Kingdom, Facebook's stock price was in the mid-$130s per share. It is currently around $170 per share, a roughly 30% increase. Thus, I

struggle to see what irreparable damage has been caused to Facebook requiring immediate relief and warranting these repeated cycles of costly activity in a case otherwise stayed and in the absence of Facebook noticing any motion for contempt or sanctions whatsoever.

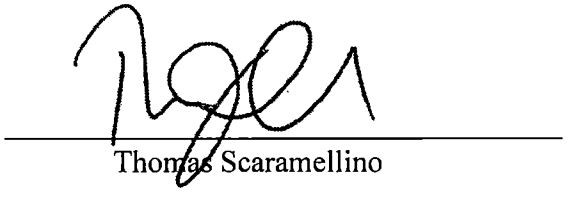
22. I believe 643's request that it have until May 31, 2019 to find replacement counsel is reasonable and that 643 is likely to secure replacement counsel if it can guarantee to such counsel adequate time to prepare for Facebook's pending motions.

23. If allowed and if I can find the time to do so, I will continue diligent efforts to assist 643 in its attempt to retain replacement counsel. In the meantime, I believe 643's current counsel should remain responsible for managing the electronically stored information ("ESI") on cloud accounts pending new counsel appearing on its behalf.

24. I understand it to be 643's position (and I certainly am not in control of it but believe it to be true) that requiring 643's current legal counsel, including its local counsel, to remain in the case notwithstanding their continued refusal to advocate on behalf of 643 has resulted in and will continue to result in great prejudice and injustice to 643, including the continued failure of 643 to file any briefs in accordance with the briefing schedule set by the Court, including the briefing schedule set forth in the Court's Order of January 24, 2018.

25. I respectfully request that the Court allow me to be represented by Mr. Russo and his firm at subsequent hearings, including the hearing scheduled for February 22, 2018 or, in the alternative, that the Court permit me to use phone conferencing to join any hearings in which the Court requires my participation. I simply cannot travel to California this month.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was entered into on February 6, 2019 in Forestburgh, New York.



Thomas Scaramellino

EXHIBIT 5

Jack Russo (Cal. Bar No. 96068)
Christopher Sargent (Cal. Bar No. 246285)
COMPUTERLAW GROUP LLP
401 Florence Street
Palo Alto, CA 94301
(650) 327-9800 office
(650) 618-1863 fax
jrusso@computerlaw.com
csargent@computerlaw.com

Attorneys for Third Parties
THEODORE KRAMER and
THOMAS SCARAMELLINO

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

Six4Three, a Delaware limited liability company, Plaintiff; v. **Facebook, Inc.**, a Delaware corporation; **Mark Zuckerberg**, an individual; **Christopher Cox**, an individual; **Javier Olivan**, an individual; **Samuel Lessin**, an individual; **Michael Vernal**, an individual; **Ilya Sukhar**, an individual; and **Does 1–50**, inclusive, Defendants.	Case No. CIV533328 Assigned for all purposes to Hon. V. Raymond Swope, Dep't 23 **DECLARATION OF THOMAS SCARAMELLINO IN SUPPORT OF OPPOSITION TO DEFENDANT FACEBOOK, INC.'S SECOND IMPROPER MOTION FOR RECONSIDERATION TO OPEN DISCOVERY** **SIGNATURE BY FAX**

I, Thomas Scaramellino, declare as follows:

1. My name is Thomas Scaramellino, I am over the age of 18. I make the following statements in response to Defendant Facebook's *Ex Parte* Application for an Order Enforcing the Stipulated Protective Order, filed on February 27, 2019. I have personal knowledge of the matters stated in this declaration, and I believe those matters to be true.

2. To the best of my knowledge neither I, nor anyone acting on behalf of Six4Three, has ever had any contact with Mr. Matthew Fowler or Mr. Duncan Campbell.

3. Neither I, nor, to the best of my knowledge, anyone acting on behalf of Six4Three or its legal team ever forwarded any information to these individuals.

4. As a result of the Court's orders that I delete all information related to this matter in my possession, to the extent I once had copies of any certifications under the Protective Order signed by any consulting experts, I no longer have copies of such documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was entered into on February 27, 2019 in Forestburgh, New York.

Thomas Scaramellino

EXHIBIT 6

Jack Russo (Cal. Bar No. 96068)
Christopher Sargent (Cal. Bar No. 246285)
COMPUTERLAW GROUP LLP
401 Florence Street
Palo Alto, CA 94301
(650) 327-9800 office
(650) 618-1863 fax
jrusso@computerlaw.com
csargent@computerlaw.com

Attorneys for Third Parties
THEODORE KRAMER and
THOMAS SCARAMELLINO

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

Six4Three, LLC, a Delaware limited liability company,

Plaintiff;

v.

Facebook, Inc., a Delaware corporation; **Mark Zuckerberg**, an individual; **Christopher Cox**, an individual; **Javier Olivan**, an individual; **Samuel Lessin**, an individual; **Michael Vernal**, an individual; **Ilya Sukhar**, an individual; and **Does 1–50**, inclusive,

Defendants.

Case No. CIV533328

Assigned for all purposes to Hon. V. Raymond Swope, Dep't 23

DECLARATION OF THOMAS SCARAMELLINO IN COMPLIANCE WITH AMENDED CASE MANAGEMENT ORDER NO. 19

I, Thomas Scaramellino, declare as follows:

1. My name is Thomas Scaramellino, I am over the age of 18. I make the following statements in compliance with the Court's March 13, 2019 Order that I submit a Declaration pursuant to Amended Case Management Order no. 19.

2. Until my relationship with Birnbaum & Godkin, LLP ended in early December 2018, I assisted in the present litigation as a law clerk of the legal team for Plaintiff Six4Three, LLC, supervised by David Godkin. Because I was not employed full-time by Birnbaum & Godkin, I was required by Mr. Godkin to execute the Protective Order certification before I was given access to Facebook's confidential information. A true and correct copy of this executed certification is attached as **Exhibit 1**. At the time I executed this certification, it was understood that I would only be provided access to Facebook's confidential information; I therefore struck out the words "Highly Confidential Information" on the certification. As the litigation progressed and my assistance was requested in drafting pleadings which involved Facebook's highly confidential information, and after obtaining the Court's permission regarding my involvement as a law clerk in response to a motion filed by Facebook attempting to sever me from the legal team, I was permitted access to Facebook's highly confidential information as well. At all times I understood that strict compliance with the Protective Order was required.

3. At no time from my execution of the attached certification on December 1, 2016 have I provided information subject to the Protective Order to any unauthorized individuals or outside the scope of Mr. Godkin's supervision or without Mr. Godkin's knowledge.

4. Pursuant to the Court's December 14, 2018 Order, on December 19, 2018, in the presence of counsel for Facebook and Facebook's forensics firm, I took all steps necessary to delete, destroy, or return to Facebook all confidential and highly confidential information produced by Facebook under the Protective Order, and I executed a Certification of Destruction to the Court. A true and correct copy of this certification is attached as **Exhibit 2**.

5. In the Summer of 2017, Mr. Godkin directed the legal team to analyze the privilege logs served by Facebook on Birnbaum & Godkin, which were served in an unsearchable PDF format and contained more than 14,000 entries. In order to analyze the

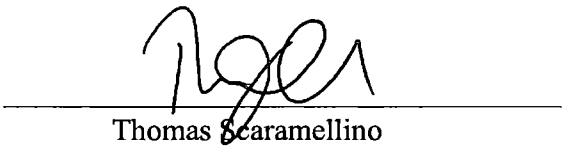
privilege logs, it became necessary to convert the file to a readable and searchable Microsoft Excel format, because Facebook refused to provide the file in native Excel format. Once converted, it further became necessary to write software code that would enable us to automate the process of reviewing such a large file with over 14,000 entries. To accomplish this task, Mr. Godkin authorized me to obtain the aid of Mr. Brent Frissora, who has significant experience in analyzing large data sets, coding macros and programs that can analyze data in Microsoft Excel, and various related tasks. Despite the limited scope of Mr. Frissora's involvement in the present litigation, he was required to execute a Protective Order certification before he began his work as an extra precaution, which he did on August 4, 2017. A true and correct copy of Mr. Frissora's executed certification is attached as **Exhibit 3**. Mr. Frissora never received any of the content or the documents identified in those logs.

6. Mr. Frissora's expertise proved valuable to advancing 643's interests in the case as his program was able to identify a wide range of deficiencies in Facebook's privilege log, including that more than half of the 14,000 entries did not include any communication to or from any attorney. Mr. Frissora's program was further able to detect that Facebook made material undisclosed changes across three iterations of its privilege logs, deleting documents from the logs that had not been produced in this litigation. These serious deficiencies (and numerous others) regarding Facebook's privilege logs were brought to the Court's attention in letters during the Fall of 2017. To date, the Court has not ruled on this request by Six4Three.

7. As confirmed by Mr. Frissora, he has deleted and destroyed Facebook's privilege logs and his work product related to this litigation.

8. I have had no communication with the other experts mentioned in David Godkin's Declaration of March 5, 2019 since at least early December 2018 and do not have personal knowledge of and therefore cannot testify as to their subsequent destruction or return of this information.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was entered into on March 14, 2019 in Rumson, New Jersey.



Thomas Scaramellino